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Proposed Attorney for Debtors

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In Re:

WES CONSTRUCTION COMPANY,
INC., a Nevada corporation,
HEAVY EQUIPMENT SERVICES, LLC,
a Nevada limited liability company,

Case No. BK-N-09-52177-GWZ (Lead)
Case No. BK-N-09-52178-GWZ
Case No. BK-N-09-52181-GWZ
(Jointly Administered)

TRUCKING SERVICES, LLC,
a Nevada limited liability company,

Debtors.

WES CONSTRUCTION COMPANY,
INC., a Nevada corporation,

Adv. No. _____

Plaintiff,

v.

**COMPLAINT FOR RECOVERY OF
PREFERENTIAL TRANSFERS AND FOR
EQUITABLE SUBORDINATION**

MB FINANCIAL BANK, N.A., a
National Association,

Defendant.

COMES NOW Plaintiff, WES CONSTRUCTION COMPANY, INC., a Nevada
corporation (“WES”), and complains against MB Financial Bank, N.A. (“MB Financial”) as
follows:

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1 **GENERAL ALLEGATIONS**

2 1. The above-captioned debtors filed petitions commencing cases under chapter
3 11 of the Bankruptcy Code on July 6, 2009 (the "Petition Date"). The debtors continue to
4 operate their businesses as debtors-in-possession.

5 2. Plaintiff, WES Construction Company, Inc. is a Nevada corporation.

6 3. Defendant, MB Financial Bank, N.A. is a financial institution doing business
7 in the State of Nevada ("MB Financial").

8 **JURISDICTION AND VENUE**

9 4. This Court has jurisdiction over this adversary proceeding pursuant to 28
10 U.S.C. §157 and §1334, and pursuant to 11 U.S.C. § 502, 510, and 547. Plaintiff believes
11 and avers that the claims for relief are "core" proceedings subject to determination by this
12 Court pursuant to 28 U.S.C. §157(b)(2)(B), (C), (E), and (F) or otherwise related matters
13 pursuant to 28 U.S.C. §1334. In the event any claim for relief is determined not to be a
14 "core" proceeding, Plaintiff hereby consents to its determination of such claim by this Court.

15 5. Venue is proper pursuant to 28 U.S.C. §1449.

16 **FIRST CLAIM FOR RELIEF**

17 **(Preferential Transfers to MB Financial)**

18 6. Plaintiff hereby incorporates each and every averment set forth in paragraphs
19 1 through 5 above as if fully set forth herein.

20 7. That on or about May 14, 2009, WES conducted an auction of certain
21 equipment more particularly identified in Exhibit "A" attached hereto and incorporated by
22 reference herein (hereinafter the "Sold Equipment"). MB Financial was not identified as a
23 lien holder on any of the titles for the Sold Equipment, and did not have a security interest
24 in the Sold Equipment.

25 8. At the time of the auction, and thereafter (as more specifically set forth below),
26 MB Financial had instituted strict financial controls on the Debtor, and required the deposit
27 of all income received from any source into an MB Financial account, with disbursements
28 to be made only upon approval of MB Financial. On or about June 7, 2009, all of the

1 proceeds from the sale of the Sold Equipment were paid to MB Financial (hereinafter
2 referred to as the "Transfer").

3 9. At the time of the Transfer, MB Financial was owed a substantial unsecured
4 debt by the Debtor, which had been in existence for more than one year.

5 10. At the time of the Transfer, the Debtor was insolvent.

6 11. The Transfer was made within 90 days prior to the Petition Date.

7 12. The Transfer enabled defendant MB Financial to receive more than it would
8 have received if the case were a case under chapter 7 of the Bankruptcy Code, the Transfer
9 had not been made, and defendant MB Financial received payment of such debt to the extent
10 provided for by the Bankruptcy Code.

11 13. The Transfer is an avoidable preferential transfer in accordance with Title 11
12 U.S.C. §547(b).

13 WHEREFORE, WES prays for relief as hereinafter set forth.

14 **SECOND CLAIM FOR RELIEF**

15 **(Equitable Subordination)**

16 14. Plaintiff hereby incorporates each and every averment set forth in paragraphs
17 1 through 13 above as if fully set forth herein.

18 15. Commencing approximately in March of 2009, defendant MB Financial
19 embarked upon a program designed to control WES with the sole purpose of providing the
20 maximum financial benefit to MB Financial, including:

- 21 a. Demanding that all deposits be made directly into an MB Financial
22 account;
- 23 b. Threatening key employees by stating that if any payments were
24 diverted other than being deposited directly into MB Financial's bank
25 account, it would be considered conversion and legal action would be
26 instituted against them;
- 27 c. Requiring the approval of MB Financial for each and every check
28 issued by WES, and on occasions, even when checks were authorized,

1 such checks were subsequently disapproved by MB Financial.

2 d. Demanding that WES employ Sean Broderick ("Broderick") as its chief
3 reconstruction officer, to be paid a fee from WES of \$315.00 per hour, plus
4 expenses. Broderick was employed effective June 18, 2009. Broderick
5 reported directly to MB Financial each day, took directions directly
6 from MB Financial, and refused to take directions from the board or
7 other personnel at WES.

8 e. The actions of Broderick were designed solely to benefit MB Financial,
9 including assurance that all income to WES was paid directly to MB
10 Financial, that the only creditors paid were those necessary in order to
11 assure future receipts of accounts receivable, and to implement the
12 overall plan of liquidation in order to provide maximum benefit to MB
13 Financial.

14 16. As a result of the control exercised by MB Financial both directly and through
15 its agent Broderick, WES was stripped of all available cash needed for successful operations;
16 various jobs were delayed; certain vendors were not paid creating a public perception that
17 WES was failing; certain checks previously authorized by MB Financial were subsequently
18 dishonored, which furthered the perception that the company had insufficient cash; and the
19 company was placed in a position where it was unable to bid upon significant future jobs due
20 to lack of funding.

21 17. Furthermore, on June 29, 2009, MB Financial circulated to WES a proposed
22 forbearance agreement, insisting that the same be signed no later than July 3, 2009. MB
23 Financial indicated that in the event the forbearance agreement was not signed, it would
24 declare the loans and obligations all due and payable, and take appropriate action. The
25 forbearance agreement specifically provided that additional security would be granted to
26 MB Financial, including any causes of action that the Debtor had against Roy A. Walker and
27 certain other entities.

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1 18. By its actions, MB Financial essentially assumed control of WES, and placed
2 WES in a position where it could no longer profitably operate its business, and created a
3 public perception that WES was in the process of liquidation.

4 19. Pursuant to 11 U.S.C. § 510(c), the claim of MB Financial should be
5 subordinated to all other allowed claims of the Debtor, and the liens securing the claim of
6 MB Financial should be transferred to the estate.

7 **WHEREFORE**, Plaintiff prays for relief as follows:

8 1. With respect to the First Claim for Relief, for the recovery of all preferential
9 transfers made to MB Financial, together with the interest thereon, from and after the date
10 of such transfers;

11 2. With respect to the second claim for relief, for an order equitably subordinating
12 the claim of MB Financial to all other creditors of the Debtor, and transferring the lien
13 securing the subordinated claim of MB Financial to the estate;

14 3. With respect to all claims for relief, for reasonable costs and attorney's fees;
15 and

16 4. For such other and further relief as the court shall deem just and proper.

17 DATED this 27th day of July, 2009.

18 LAW OFFICES OF ALAN R. SMITH

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20 By: /s/ Alan R. Smith
ALAN R. SMITH, ESQ.
21 Proposed Attorney for Debtor
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Exhibit "A"

WES CONSTRUCTION CO., INC. RBA Auction 05/14/09 - Final																	
Type	Sub Type	Equip #	MB Bank or unsecured	Title Copy	RBA Lot #	Actual Proceeds \$/50% AUCTION	Under \$2500 Surcharge	RBA Commission @ 11%	Refurb. Clean or Repair	Transport	Net Proceeds	Fixed Asset Owner	Year	Description	Model	Serial Number	Note requested title copy from RBA
Pickup		4069	unsecured	no	702	6,000	0	660	25	250	5,065		2000	F250		1FTN02177EBA041	
40 - Trucks - Diesel	Truck Flatbed/Utility	4076	unsecured	yes	662	2,250	225	248	41	250	1,487	WES	1996	F250	F250 Utility 2X4	1FTN2Z177EBA8273	
40 - Trucks - Diesel	Truck Flatbed/Utility	4079	unsecured	yes	627	5,000	0	550	41	250	4,159	WES	1999	F350	F350 Flatbed 2X4	1FDMF07X0EB13516	
40 - Trucks - Diesel	Truck Flatbed/Utility	4084	unsecured	yes	619	3,000	0	330	41	250	2,379	WES	1999	F450	F450 Flatbed 2X4	1FD0F46F0XEA27465	
40 - Trucks - Diesel	Truck Flatbed/Utility	4086	unsecured	yes	620	3,000	0	330	281	250	2,139	WES	1999	F450	F450 Flatbed 2X4	1FD0F46F0XEA24201	
40 - Trucks - Diesel	Truck Flatbed/Utility	4088	unsecured	yes	618	3,500	0	385	41	250	2,824	TS	1999	F550	F550 Flatbed 2X4	1FDMF46F0XEA24550	
40 - Trucks - Diesel	Mechanic Diesel	4099	unsecured	yes	373A	4,500	0	495	41	250	3,714	TS	1997	F450-Service	F350 Mechanic 2X4	3PEL474F0VMA25298	
50 - Trucks - Diesel	Trucks Tractor 3-Axle	5098	unsecured	yes	398	20,000	0	2,200		500	17,300	TS	2000	379	Polehill 379	1XPD0803705H4305	
60 - Trailers	Trailers Side Dumps 20 Yard	6073	unsecured	yes	1596	20,500	0	2,255		250	17,995	TS	2004	Front Side Dump	TK60SSD	1TNS2025AM07165	
60 - Trailers	Trailers Side Dumps 20 Yard	6074	unsecured	yes	1603	5,500	0	605		100	4,795	TS	2004	Side Dump Dolly	TK2CD	1TNS2025AM07165	
60 - Trailers	Trailers Side Dumps 20 Yard	6075	unsecured	yes	1593	20,500	0	2,255		250	17,995	TS	2004	Front Side Dump	TK60SSD	1TNS2025AM07165	
60 - Trailers	Trailers Side Dumps 20 Yard	6076	unsecured	yes	1595	20,500	0	2,255		250	17,995	TS	2004	Front Side Dump	TK60SSD	1TNS2025AM07165	
60 - Trailers	Trailers Side Dumps 20 Yard	6077	unsecured	yes	1602	5,500	0	605		100	4,795	TS	2004	Side Dump Dolly	TK2CD	1TNS2025AM07165	
60 - Trailers	Trailers Side Dumps 20 Yard	6078	unsecured	yes	1594	20,500	0	2,255		250	17,995	TS	2004	Rear Side Dump	TK60SSD	1TNS2025AM07163	
60 - Trailers	Trailers Lowbed Tow	6079	unsecured	yes	1554	3,500	0	385		250	2,865	TS	2001	TK24-2400	24 Ton Flatbed	TK2024831M037013	
60 - Trailers	Trailers First Transfer	6090	unsecured	yes	495	0	0	0		200	(200)	TS	2005	Transfer Reliance	3TROHD-24	3REFAS30355054219	
60 - Trailers	Trailers Second Transfer	6091	unsecured	yes	1599	9,500	0	1,045		500	8,455	TS	2005	Transfer Reliance	2TROHD-22	3REFAS30355054219	
60 - Trailers	Trailers First Transfer	6092	unsecured	yes	496	0	0	0	41	500	(541)	TS	2005	Transfer Reliance	3TROHD-24	3REFAS30355054214	
60 - Trailers	Trailers Second Transfer	6093	unsecured	yes	1598	10,000	0	1,100		200	8,700	TS	2005	Transfer Reliance	2TROHD-22	3REFAS30355054217	
60 - Trailers	Pickup Diesel	16078	unsecured	yes	1606	6,000	0	660			5,340	WES	1990	20 belly dump	F250	1H4M0420L21401	
40 - Trucks - Diesel	Truck Flatbed/Utility	40108	unsecured	yes	701	5,500	0	605	41	250	4,604	WES	2000	F250	F250 Pickup 4X4	1FTN02177EBA3682	
40 - Trucks - Diesel	Pickup Gasoline	40110	unsecured	yes	617	3,500	0	385	41	250	2,824	WES	2000	F550	F550 Flatbed 2X4	1FDMF07X0EB13657	
40 - Truck - Gasoline	Truck Flatbed/Utility	40111	unsecured	yes	714	3,000	0	330	168	250	2,252	WES	2000	F150	F150 Pickup 4X4	1FTF07W0V0V12867	
40 - Trucks - Diesel	Truck Flatbed/Utility	40112	unsecured	yes	588	5,500	0	605	41	250	4,854	WES	2001	F450	F450 Flatbed 2X4	1FD0F4771EC038599	
40 - Trucks - Diesel	Truck Flatbed/Utility	40117	unsecured	yes	587	5,500	0	605	41	250	4,604	WES	2001	F450	F450 Flatbed 2X4	1FD0F46F0E007334	
40 - Trucks - Diesel	Pickup Diesel	40119	unsecured	yes	678	7,000	0	770	41	250	5,939	WES	2001	F250	F250 Pickup 4X4	1FTN02177EBA83374	
40 - Truck - Gasoline	Pickup Gasoline	40122	unsecured	yes	706	3,500	0	385	386	250	2,479	WES	2000	C-20	1500 Pickup EXT-CAB 2X4	36CEN197Y1121622	
40 - Trucks - Diesel	Truck Flatbed/Utility	40127	unsecured	yes	604	6,000	0	660	41	250	5,049	WES	2001	F350	F350 Flatbed 2X4	1FDMF07X0EB32407	
50 - Trucks - Diesel	Trucks Transfer 3-Axle	50109	unsecured	yes	496	55,000	0	6,050		200	48,750	TS	2005	1-800	KW - 1800	38C0X0205F07988	
50 - Trucks - Diesel	Trucks Transfer 3-Axle	50110	unsecured	yes	495	64,000	0	7,040	41	500	56,419	TS	2005	1-800	KW - 1800	38C0X0205F07987	
50 - Trucks - Diesel	Trucks Dump 5 Yard 2-Axle	50112	unsecured	yes	511	9,500	0	1,045		250	8,205	TS	1999	F450 Dumping 2X4	JHC 4700-2	1HTSC4AM20444100	
50 - Trucks - Diesel	Trucks Tractor 3-Axle	50121	unsecured	yes	396	20,000	0	2,200	41	500	17,589	TS	2000	3-Axle Tractor	KW - 1800	1XPD0803705H43101	
50 - Trucks - Diesel	Trucks Water 3-Axle	50125	unsecured	yes	477	23,000	0	2,530	1,535	700	18,235	WES	2000	3-Axle Water Truck	JHC 4900	1HTS4M0161040659	
60 - Trailers	Trailers Side Dumps 20 Yard	60104	unsecured	yes	1591	20,500	0	2,255		250	17,995	TS	2005	Front Side Dump	TK60SSD	1TNS2025AM062688	
60 - Trailers	Trailers Side Dumps 20 Yard	60106	unsecured	yes	1592	20,500	0	2,255		250	17,995	TS	2005	Rear Side Dump	TK60SSD	1TNS2025AM062699	
											2,969	46,338	225	9,000	362,719		

EXHIBIT "A"